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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

THE CITY OF GAINESVILLE, FLORIDA - - - - - - - Petitioner

versus

ISLAND CREEK COAL SALES COMPANY - - - - - - - Respondent

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TABLE OF CONTENTS

	PAGE
I. The Sixth Circuit Decision Impermissibly Sanctions Intrusion on The Province of The Arbitration Panel	1– 6
II. The Sixth Circuit Decision Grants an Impermissibly Expansive Reading to 9 U.S.C. §11	6– 8
Conclusion	9

TABLE OF AUTHORITIES

Cases PAGE

Boston Shipping v. *International Longshoreman's Association*, 659 F. 2d 1 (1st Cir. 1981) 7

Cleveland Paper Handlers, Etc. v. *E. W. Scripps Co.*, 681 F. 2d 457 (6th Cir. 1982) 3

Coast Trading Co. v. *Pacific Molasses Co.*, 681 F. 2d 1195 (9th Cir. 1982) 4

Diapulse Corp. of America v. *Carba, Ltd.*, 626 F. 2d 1108 (2d Cir. 1980) 4, 7

Mitsubishi Motors Corp. v. *Soler Chrysler-Plymouth*, ____ U. S. ____, 105 S. Ct. 3346 (1985) ... 4

Mobil Oil Corp. v. *Local 8-766*, 600 F. 2d 322 (1st Cir. 1979) 4

San Francisco Electrical Contractors Association, Inc. v. *International Brotherhood of Electrical Workers*, 577 F. 2d 529 (9th Cir. 1978) 3

Statutes

9 U.S.C. Sec. 11 .....2, 6, 7

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v.

ISLAND CREEK COAL SALES COMPANY - *Respondent*

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The thrust of Island Creek's Opposition to the Petition is that regardless of whether the decision of the Sixth Circuit is incorrect, review by this Court is not merited because [1] there is no conflict with other circuits or with the decisions of this Court, and [2] this case presents no issue not confined to its own facts. Neither assertion is correct. The decision of the United States Court of Appeals for the Sixth Circuit sets forth far-reaching law which is not only at odds with statutory and case authority regarding the arbitral review process, but which, if permitted to stand, will have a decisive and undersirable impact on other cases and on the usefulness of arbitration as a dispute-resolution device.

I. THE SIXTH CIRCUIT DECISION IMPERMISSIBLY SANCTIONS INTRUSION ON THE PROVINCE OF THE ARBITRATION PANEL.

The opinion of the Sixth Circuit clearly states at the outset the legal issues it addresses:

[1]The affiliate certification required by Sup. Ct. Rule 28.1 is accurate as set forth in the Petition.

> The first issue involves the power of a district court to enforce or clarify *its* judgment during the pendency of an appeal. The second issue involves

Appendix p. 1a (emphasis added).[2]

> the meaning and enforceability of an arbitration award under the Arbitration Act, 9 U.S.C. §§ 1-11.

At App. pp. 4a-5a, the Sixth Circuit addressed the first issue, and concluded that pendency of an appeal did not deprive the district court of jurisdiction "to supervise its judgment and enforce its order." Gainesville has no quarrel with this general legal principle; however, in the context of this case, the Sixth Circuit's conclusion sanctions a reviewing court's substitution of its judgment for that of the arbitrators. The theory on which this conclusion was based derives from cases involving district court action necessitated by the creation of *new* facts not in existence at the time of the judgment as to which appeal is pending. However, the Sixth Circuit decision extends that theory to situations in which post-judgment action is based on purported facts *newly found* by the district court, even where such purported facts were in existence prior to the judgment. The effect is a serious encroachment on finality of judgment in any type of case.

In the context of confirmation of an arbitration award, however, this extension is even more dangerous. The post-judgment district court order here was based on its own findings of fact, facts not found by the arbitrators although the evidence was in existence at the time of the award. Thus, the effect of the determina-

[2]Appendix pages 1a through 26a are contained in the Petition.

tion of the Sixth Circuit is to approve a district court's own interpretation of contractual relations, after confirming an arbitration award, based on facts previously in existence but not found by or even presented to the arbitration panel. Such a principle represents a serious erosion of the concepts of conclusiveness of arbitral decisions and finality of judgment.

Respondent cites *San Francisco Electrical Contractors Association, Inc.* v. *International Brotherhood of Electrical Workers,* 577 F. 2d 529 (9th Cir. 1978) in support of the Sixth Circuit decision, but the horse will not carry that rider. The arbitration award in issue there construed a contract and approved action as to a "complete Electro-Connect system." Subsequently, the union proposed a separate arbitration as to an essential portion of that complete system. The court concluded that the previous arbitration had necessarily resolved the subsidiary issue. This fundamental question—does the arbitration award *necessarily* include the subsequent dispute—was also involved in *Cleveland Paper Handlers, Etc.* v. *E. W. Scripps Co.,* 681 F. 2d 457 (6th Cir. 1982).

The problem here is that the district court's action added an obligation that was *not* necessarily included within the award. That is, the award precluded cancellation of the contract on the grounds at issue in the arbitration, but the contract could have been performed *without* the schedule of deliveries leading to the concept of "missed shipments." The principle that a reviewing court may analyze an award and enforce it cannot equate with the notion that a district

court may analyze the relationship between the parties and add to the award something not necessarily included by the arbitrators. This is the dangerous principle announced by the Sixth Circuit.

Such a principle is in direct conflict with the decisions of other Circuits, which hold that a district court is without power to substitute its factual determinations for those of the arbitrators. *See, e.g., Mobil Oil Corp.* v. *Local 8-766,* 600 F. 2d 322 (1st Cir. 1979); *Coast Trading Co.* v. *Pacific Molasses Co.,* 681 F. 2d 1195 (9th Cir. 1982); *Diapulse Corp of America* v. *Carba, Ltd.,* 626 F. 2d 1108 (2d Cir. 1980). As this Court has recently observed,

> . . . the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal.

Mitsubishi Motors Corp. v. *Soler Chrysler-Plymouth,* ___ U. S. ___, 105 S. Ct. 3346, 3360 (1985).

It begs the question for Respondent to suggest that the district court did not read into the arbitration award a new requirement that Gainesville accept 10,000 tons of coal every eight days. The opinions are clear: The district court ordered Gainesville to take 90,000 tons of coal, and it did so on the basis of its *own* finding that the contractual status required Gainesville to take 10,000 tons of coal every eight days. This requirement does *not* appear in the contract. It does *not* appear in the arbitration award. It does *not* appear in the judgment confirming the arbitration award.

Island Creek has suggested that Gainesville has "misstated" the case by pointing out that Island Creek did not request inclusion of such a delivery schedule in the interim arbitration order. Gainesville must respectfully note that this is *not* a misstatement. Island Creek was given the opportunity for input into the wording of the award, and it did *not* offer any such schedule. The inclusion of such a schedule in the interim arbitration order was absolutely essential to the validity of the subsequent acts of the district court and the Sixth Circuit, because it is the *only* means of arriving at the concept of "missed shipments." Such a schedule was *not* suggested by Island Creek at arbitration, and it does *not* appear in the interim order.

Indeed, the district court recognized that such a schedule did not appear in the interim arbitration order (and, therefore, did not appear in the judgment of confirmation). We know this because the district court referred to the order challenged here as a "clarification" [App. p. 17a]. Furthermore, the Sixth Circuit also recognized that such a schedule did not appear in the interim arbitration order (and, therefore, did not appear in the judgment of confirmation). We know this because the Sixth Circuit recognized that the supporting facts were "found" by the *district court* [App. p. 7a].

Thus, far from offering discrete facts of interest only to the parties, this Petition seeks review of a broad principle representing a substantial departure from prior law. The Sixth Circuit decision herein condones a post-judgment order based on a post-judgment find-

ing—not of newly created facts, but of previously existing "facts." Furthermore, the Sixth Circuit decision improperly condones such action even though the district court factual determination invades the province of the arbitrators. Such a rule of law cannot be allowed to stand.

II. THE SIXTH CIRCUIT DECISION GRANTS AN IMPERMISSIBLY EXPANSIVE READING TO 9 U.S.C. §11.

As noted above, the Sixth Circuit decision stated the second of the two issues addressed in the opinion as "the meaning and enforceability of an arbitration award under the Arbitration Act" [App. p. 1a]. At App. pp. 6a-7a, the Sixth Circuit concluded that the district court had authority to make findings of fact and interpret an arbitration order, long after its entry, and long after the district court's judgment of confirmation was on appeal. As the Sixth Circuit stated clearly,

> We hold that the district court possessed authority under 9 U.S.C. §11 to enforce the clear meaning and intent of that order.

App. p. 6a. The Sixth Circuit recognized that the contract itself did not provide the 10,000 ton every eight days schedule necessary to support the concept of "missed shipments," but it approved the district court's finding of fact to support such a schedule:

> The district court found that Gainesville had previously accepted and paid for 10,000 tons of coal every eight days . . .

App. p. 7a.

The various procedural impediments to proper application of 9 U.S.C. §11 have been discussed in Gainesville's Petition, and need not be reiterated here. It is sufficient for purposes of this Reply to note, contrary to Island Creek's suggestion, that the clear impact of the Sixth Circuit decision is to authorize district court use of 9 U.S.C. §11 to "clarify" an arbitration award as to a matter regarding which no factual determination was made by the arbitrators. This represents an enormous expansion of a district court's review powers, an expansion which is not authorized by the statute, seriously endangers the important principle of conclusiveness of arbitration findings, and places the Sixth Circuit in conflict with other Circuits and with the announcements of this Court.

For example, in *Boston Shipping* v. *International Longshoreman's Association,* 659 F. 2d 1, 3 (1st Cir. 1981), the court noted the severe restrictions which the arbitral process places on a court's power to supplement or interpret an arbitration award

> . . . even when it would appear in keeping with the intention of the parties to do so. When enforcement requires an interpretation of the arbitrators' award, the proper course is to remand to the arbitrator for *clarification* (emphasis added).

This observation is particularly significant here, since the action approved by the Sixth Circuit pursuant to 9 U.S.C. §11 was characterized by the district court itself as "clarification."

Similarly, in *Diapulse Corp. of America* v. *Carba, Ltd., supra,* at 1110, the court observed:

> Section 11(c), which is limited to matters of form not affecting the merits of the controversy, does not license the district court to substitute its judgment for that of the arbitrators.

It cannot seriously be argued that an interpretation of contractual relations, requiring findings of fact by the district court, and going to the very nature of the obligations imposed by the arbitrators' interim order, can be considered a matter "of form not affecting the merits of the controversy."

The Sixth Circuit's departure from well-established principles severely limiting the district court's review powers creates a multi-faceted dilemma. Contracting parties considering arbitration are left in doubt as to whether the arbitration would be conclusive, or whether a district court would later engage in its own fact-finding process. The conflict of the Sixth Circuit with other Courts of Apeals may well lead to forum shopping, resulting in procedural litigation at odds with the arbitral interest in speedy dispute resolution. District courts presented with confirmation petitions are left in doubt regarding the extent of their review authority. Clearly, such impact goes far beyond the parties to this case.

Furthermore, as dramatic as the impact is for the commercial arbitration setting, it is not limited to such settings. The Sixth Circuit decision goes to the heart of the arbitration process as a dispute resolution vehicle. Thus, its impact extends by ready analogy to other arbitration settings, perhaps most notably to labor arbitration.

CONCLUSION

This atmosphere of confusion and doubt can be dispelled only by grant of the review sought here. For the reasons set forth above, and the reasons set forth in Gainesville's petition for a writ of certiorari, Gainesville respectfully submits that its petition should be granted in the interest of resolving a conflict of law and removing the frustrating uncertainty injected into the arbitration scheme by the Sixth Circuit's decision.

Respectfully submitted,

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